No. 14972

# In the United States Court of Appeals for the Ninth Circuit

JAMES F. CRAFTS, APPELLANT

*v.*

FEDERAL TRADE COMMISSION, APPELLEE

*ON APPEAL FROM AN ORDER ENFORCING SUBPOENA*

## BRIEF FOR APPELLEE


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## AUTHORITIES CITED

Cases:

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No. 14972

JAMES F. CRAFTS, APPELLANT

*v.*

FEDERAL TRADE COMMISSION, APPELLEE

*APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SOUTHERN DIVISION*

## BRIEF FOR APPELLEE

### I. Statement of the case

This is an appeal from an order entered by the United States District Court for the Northern District of California, Southern Division, on October 25, 1955, pursuant to Section 9 of the Federal Trade Commission Act (38 Stat. 722; 15 U. S. C., Sec. 49).[1]

On March 11, 1955, the Federal Trade Commission instituted a proceeding (R. 8–16) against Fireman's Fund Indemnity Company alleging that it had reason

[1] Pertinent provisions of Sections 5 and 9 of the Federal Trade Commission Act (38 Stat. 717 (1914), as amended, 15 U. S. C. 41 (1952)) and the McCarran-Ferguson Insurance Regulation Act (59 Stat. 33 (1945), as amended, 15 U. S. C. 1011 (1952)) are set forth in the Appendix.

to believe the corporation was violating the provisions of Section 5 of the Federal Trade Commission Act. On September 22, 1955, the Commission, acting pursuant to Section 9 of the Federal Trade Commission Act, issued and caused to be served upon the president of Fireman's Fund, James F. Crafts, a subpoena duces tecum requiring his presence at 10:00 o'clock a. m., October 17, 1955, before the Commission's hearing examiner in San Francisco, California, to testify in that proceeding and to produce certain documents (R. 20–23). Crafts appeared at the hearing but refused to answer questions or to produce any of the documentary evidence required by the subpoena (R. 42–43).

In accordance with the provisions of Section 9 of the Federal Trade Commission Act, the Commission, on October 18, 1955, applied to the court below for an order enforcing the subpoena (R. 3–23). At the conclusion of the hearing on this application the court entered an order directing compliance with the subpoena (R. 46–47). This appeal is from that order.

## II. Question presented

Did the District Court rightly decide that the question presented by appellant was one of coverage?

## III. Argument

### A. Preliminary statement

Appellant contends that the District Court held the Commission's subpoena must be enforced "merely because it was issued and served with due formality" (Br. 7). This misstates the holding of the court.

Actually appellant presented to the court below a question of "coverage" and the court correctly held that it could not decide a question of "coverage" in the sterile atmosphere of a subpoena enforcement proceeding (R. 63, 77, 81, 90).

Initially it should be observed that appellant's claim below was limited:

Appellant recognized that Section 5 of the Federal Trade Commission Act gave the Commission authority to investigate and proceed against—

> Unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce * * *.

Appellant did not contest the Commission's general subpoena power under Section 9 of the Federal Trade Commission Act;[2] and,

Appellant conceded that the McCarran-Ferguson Insurance Regulation Act (hereafter referred to as the McCarran Act)[3] specifically made the Federal Trade Commission Act applicable to the business of insurance when it provided in part:

> That after * * * 1948 * * * the Federal Trade Commission Act * * * shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

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[2] See *Clarke* v. *Federal Trade Commission*, 128 F. 2d 542 (C. A. , 1942). Provisions substantially similar to Sections 9 and 10 of he Federal Trade Commission Act appear in later acts, includng: Fair Labor Standards Act, Packers & Stockyards Act, Securities & Exchange Commission Act and the National Labor Relations Act, and cases involving those acts are pertinent to a consideration of the Commission's powers under Sections 9 and 10 of the Federal Trade Commission Act.

[3] 59 Stat. 33 (1945); 15 U. S. C. 1011–1015 (1952).

In the court below, appellant argued: first, that the Commission had no jurisdiction over the practices of Fireman's Fund because as a California corporation, Fireman's Fund is regulated by California law no matter where it does business; and, in the alternative, argued that at least 38 states had laws relating to insurance advertising, and that the subpoena should be limited to its acts and practices in states without such laws.[4]

Since the McCarran Act clearly made the Federal Trade Commission Act applicable to the business of insurance "to the extent that such business is not regulated by State law," the District Court pointed out that appellant was presenting a question of coverage (R. 77), and that under the authority of *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501 (1943) and the line of cases following, it was not the function of the District Court to decide the question of coverage (R. 63).

Appellant attempted to distinguish this line of cases in three ways. He argued:

> 1. That the question presented was not a question of coverage, but rather a question of law, whether the Commission has authority to proceed at all (R. 82).
>
> 2. That Section 6 (c) of the Administrative Procedure Act gives the court the right to decide the question presented (R. 68, 74, 78–80).

[4] Appellant himself did not know which states had laws relating to the advertising of insurance (R. 66). He stated: "I think I would have to admit there are at least three states that do not purport to regulate advertising in the health and accident field." (R. 87.)

3. That the Endicott Johnson line of cases does not apply to this case because that line of cases involved investigative proceedings, while this is an adjudicative proceeding (R. 68, 74).

Despite appellant's argument the District Court correctly held that the case presented only a question of coverage; that the Administrative Procedure Act did not change the prior law concerning issuance of administrative subpoenas;[5] and that the extent of the court's inquiry was not changed by the fact that the proceeding was adjudicative rather than investigative.[6]

Upon the appeal to this court, appellant has not pressed his argument that the subpoena should be limited to those states which have no laws relating to the advertising of accident and health insurance. He has also abandoned his argument that the extent of the court's inquiry in this proceeding is different because this is an adjudicative rather than an investigative proceeding. Appellant now argues that California law alone deprives the Commission of jurisdiction over all acts and practices of Fireman's Fund, or in the alternative, that the Commission is ousted of jurisdiction because the court can find

[5] See, *Tobin* v. *Banks & Rumbaugh*, 201 F. 2d 233 (C. A. 5, 1953); *Bland Lumber Co.* v. *N. L. R. B.*, 177 F. 2d 555 (C. A. 5, 1949); *United States* v. *Woerth*, 130 F. Supp. 930 (D. C. N. D. Iowa, 1955); *Kilgore Nat. Bank* v. *Federal Petroleum Board*, 209 F. 2d 557 (C. A. 5, 1954); *N. L. R. B.* v. *Hamilton*, 24 LRRM 2525 (D. C. N. D. Cal., 1948).

[6] The *Endicott Johnson* proceeding itself, for example, was based on a subpoena issued after a complaint similar to that of the Commission.

some laws affecting insurance advertising in every state if it will search the statutes. (The second argument was not raised in the court below.) In either event, appellant claims that the Commission has no jurisdiction over Fireman's Fund and that therefore the subpoena is not "in accordance with law."

In each argument appellant requests a decision as to whether this corporation's acts and practices are subject to the Commission's jurisdiction before the Commission can find out what the acts and practices are. But whether this particular company's practices are covered by the Federal Trade Commission Act is a question to be decided by the Commission in the first instance, after all the facts have been taken into account. Appellant's request for a decision on this question is premature.

**B. The District Court rightly held that the question presented by appellant was one of coverage which it could not decide**

Appellant states (Br., p. 2) that the purpose of this proceeding is to secure a judicial interpretation of Public Law 15 (79th Cong.), and thereby determine what authority, if any, the Federal Trade Commission has over the advertising of accident and health insurance policies. Appellant readily admitted below (R. 38, 41) that he had no standing to enjoin the Commission from developing the facts regarding the advertising acts and practices of Fireman's Fund [7] and it is clear that he could not foreclose investigation by seeking a declaratory judgment as to the extent of

[7] *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41 (1938); *T. C. Hurst & Son* v. *Federal Trade Commission*, 268 Fed. 874 (D. C. E. D. Va., 1920).

the Commission's authority.[8] But appellant argues that because of the provisions of Section 6 (c) of the Administrative Procedure Act[9] he can, by resisting a subpoena, obtain a determination of the extent of the Commission's authority. This determination he wants made in a factual vacuum and with respect to a statute which specifically makes the Federal Trade Commission Act applicable to the business of insurance. There is no support for appellant's posititon.

Although some questions are appropriate to and can be decided by the courts in a proceeding to enforce an administrative subpoena these questions were not raised below.[10] In the court below, appellant correctly stated the law (R. 82), that where an administrative agency has *no authority whatever* as a matter of law, the court can refuse to enforce the subpoena. But appellant conceded below (R. 85), as we think

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[8] *Miles Laboratories, Inc.* v. *Federal Trade Commission*, 140 F. 2d 683 (C. A. D. C., 1944); *Aron, et al.* v. *Federal Trade Commission*, 50 F. Supp. 288 (D. C. E. D. Pa., 1943).

[9] 60 Stat. 237, 15 U. S. C. § 1005 (c).

[10] An administrative agency may have the power to issue a subpoena, but only the courts can enforce the subpoena. The court can refuse to enforce the subpoena on certain issues which are fully before the court and which do not require further information before an adequate decision can be made. For example, the court can refuse to enforce the subpoena on the grounds that a witness claims privilege (*Boyd* v. *United States*, 116 U. S 616 (1886)), that the subpoena is too vague or unreasonable (*Hale* v. *Henkel*, 201 U. S. 43 (1906); *Federal Trade Commission* v. *American Tobacco Co.*, 264 U. S. 298 (1924)), or that the hearing is not of the kind authorized by the statute (*Harriman* v. *Interstate Commerce Commission*, 211 U. S. 407 (1908); *Ellis* v. *Interstate Commerce Commission*, 237 U. S. 434 (1915)), or that the subpoena was issued by an unauthorized person (*Cudahy Packing Co.* v. *Holland*, 315 U. S. 357 (1942)).

he must concede, that the McCarran Act made the Federal Trade Commission Act applicable to the business of insurance. The extent to which the Commission Act is applicable and whether or not it reaches particular acts and practices of Fireman's Fund presents a question of coverage which can not be decided in this proceeding.

The court below pointed up this issue to appellant as follows:

> But aren't you anticipating here? In other words, this is the start of this hearing. It may be that if the Federal Trade Commission issues some order or some regulation after the hearing has been had and after the evidence is in which is in violation of Public Law 15, that you then have the right to complain about that law and come to a court to have it determined. But at the moment this is the obtaining of evidence as to what actually has been done. (R. 90.)

We submit that the court rightly decided, in accordance with the holding in *Endicott Johnson Corp.* v. *Perkins,* 317 U. S. 501 (1943) and numerous cases to the same effect,[11] that the subpoena could not be

[11] See for example: *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186 (1946); *Penfield Co.* v. *S. E. C.*, 330 U. S. 585 (1947); *Woolley* v. *United States*, 97 F. 2d 258 (C. A. 9, 1938); *Brewer* v. *S. E. C.*, 145 F. 2d 233 (C. A. 9, 1944); *Consolidated Mines* v. *S. E. C.*, 97 F. 2d 704 (C. A. 9, 1938); *Mines & Metals Corp.* v. *S. E. C.*, 200 F. 2d 317 (C. A. 9, 1952); *Penfield Co.* v. *S. E. C.*, 143 F. 2d 746 (C. A. 9, 1944); *Detweiller Bros.* v. *Walling*, 157 F. 2d 841 (C. A. 9, 1946); *N. L. R. B.* v. *Anchor Rome Mills*, 197 F. 2d 447 (C. A. 5, 1952); *Tobin* v. *Banks & Rumbaugh*, 201 F. 2d 233 (C. A. 5, 1953); *Holloway Gravel Co.* v. *McComb*, 174 F. 2d 421 (C. A. 5, 1949); *Bland Lumber Co.* v. *N. L. R. B.*, 177 F. 2d 555 (C. A. 5, 1949); *Durkin* v. *Fisher*, 204 F. 2d 930

resisted on the grounds that the Commission has no jurisdiction over Fireman's Fund or its particular practices since the general subject matter of the investigation is clearly within the scope of the Commission's authority.[12]

Appellant insists (Br., pp. 6–20) that Section 6 (c) of the Administrative Procedure Act[13] changes the law of the *Edicott Johnson* line of cases, regarding the scope of review in subpoena enforcement proceedings. This claim is without merit. Section 6 (c) of the Administrative Procedure Act provides that the court shall enforce any subpoena issued by an administrative agency to the extent that it is found to be "in accordance with law." It is clear that by this provision the Congress intended to leave the scope

(C. A. 7, 1953); *Kilgore Nat. Bank* v. *Federal Petroleum Board*, 209 F. 2d 557 (C. A. 5, 1954); *Martin Typewriter Co.* v. *Walling*, 135 F. 2d 918 (C. A. 1, 1943); *Walling* v. *Benson*, 137 F. 2d 501 (C. A. 8, 1943), cert. denied 320 U. S. 791 (1943); *United States* v. *Woerth*, 130 F. Supp, 930 (D. C. N. D. Iowa, 1955); *Cudahy Packing Co.* v. *Fleming*, 122 F. 2d 1005 (C. A. 8, 1941), rev'd. on other grounds, 315 U. S. 785 (1942).

[12] The reason for this is a practical one: In order to determine whether an agency has jurisdiction over a particular person or activity it is necessary to ascertain facts which are not readily available to the agency. As the Supreme Court pointed out in *Oklahoma Press Publishing Co.* v. *Walling*, 327 U. S. 186 (1946), if the agency were not allowed to investigate the facts upon which its jurisdiction would be based, the agency could not perform its function efficiently. Congress has authorized the Commission to determine the question of coverage in the first instance, and its decision in this regard is subject to review in an appropriate United States Court of Appeals.

[13] Administrative Procedure Act, 60 Stat. 237, 5 U. S. C. § 1005 (c).

of judicial inquiry unchanged upon application for the enforcement of a subpoena.[14]

As originally proposed Section 6 (c) did contain a provision to the effect that, in a subpoena enforcement proceeding, the court should "determine all relevant questions of law raised by the parties, including the authority or jurisdiction of the agency." Upon consideration, this provision was omitted, and the phrase "in accordance with law" was substituted in its place. The purpose of the change was explained in *Tobin* v. *Banks & Rumbaugh,* 201 F. 2d 223 (C. A. 5, 1953), cert. denied 345 U. S. 942 (1953), as follows:

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[14] *Bland Lumber Co.* v. *N. L. R. B.*, 177 F. 2d 555, 583 (C. A. 5, 1949)—

"Congress intended to leave the scope of judicial inquiry unchanged upon an application for the enforcement of a subpoena. * * *" (At 558.)

"Its error, if any, in conducting a particular case within a general class cannot be asserted as a defense to an action to enforce a subpoena. Whether or not there is a legal impediment here of an administrative nature is an issue primarily for the Board's determination, which is not subject to review until final action has been taken by it." (At 557.)

The Court discussed the effect of the Administrative Procedure Act upon the prior law:

"This significant amendment is persuasive that the Congress intended to leave the scope of judicial inquiry unchanged upon an application for the enforcement of a subpoena. In adopting the Administrative Procedure Act as it now reads, * * * the rule laid down by the Supreme Court in the case of *Endicott Johnson Corporation* v. *Perkins*, *supra*, was enacted into statutory law." (At 558.)

See also: *Tobin* v. *Banks & Rumbaugh*, 201 F. 2d 223 (C. A. 5, 1953), cert. denied 345 U. S. 942 (1953); *N. L. R. B.* v. *Hamilton*, 24 LRRM 2525 (D. C. N. D. Cal., 1948); *United States* v. *Woerth*, 130 F. Supp. 930 (D. C. N. D. Iowa, 1955); *Kilgore National Bank* v. *Federal Petroleum Board*, 209 F. 2d 557 (C. A. 5, 1954).

> * * * Upon consideration, this provision was omitted and the term "in accordance with law" was inserted. We cannot assume that this deliberate substitution of language in view of the existing law, was not intended to define with exactness the limits of the inquiry in judicial enforcement proceedings. The reports of both the Senate and the House Judiciary Committee sustain this view.[15]
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> * * * * *
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> * * * There is nothing in the Administrative Procedure Act which suggests that the duty and burden of determining the question of coverage in the first instance was intended to be shifted from the administrative agency to the courts. To give effect to appellee's contention would, in most instances, sterilize the investigative powers of the Administrator and force him to trial without the benefit of the very evidence which the subpoena is designed to secure. (201 F. 2d at 226.)

The *Tobin* case involved a subpoena duces tecum issued by the Secretary of Labor under the Fair Labor Standards Act, which has provisions for issuing subpoenas similar to those of the Federal Trade Commission Act. The only issue was whether or not the corporation and its employees were subject to the

[15] S. Doc. No. 248, 79th Cong., 2d sess., 185, 206:

"The subsection constitutes a statutory limitation upon the issuance or enforcement of subpoenas in excess of agency authority or jurisdiction. This does not mean, however, that courts should enter into a detailed examination of facts and issues which are committed to agency authority in the first instance, but should, instead, inquire generally into the legal and factual situation and be satisfied that *the agency could possibly find that it has jurisdiction.*" [Emphasis supplied.]

provisions of the statute. The court held that in the absence of a clear showing of gross abuse of discretion, the District Court had no jurisdiction to inquire into the question of coverage. On the question of whether the judicial enforcement of the subpoena was dependent on a prior adjudication that the employees are within the coverage of the act, the court said:

> This is not a novel issue, but is one which we have previously considered. *Mississippi Road Supply Co.* v. *Walling,* 5 Cir., 136 F. 2d 391; *Holloway Gravel Co.* v. *McComb,* 5 Cir., 174 F. 2d 421, 422. In the last cited case we expressly refrained from deciding whether the question of coverage was a proper subject for determination on application for enforcement for a subpoena duces tecum, but held that in the absence of a clear showing of unreasonableness or gross abuse of the administrative investigative function, the courts will not interfere with an investigation "merely in order to render an anticipatory judgment on the merits." (201 F. 2d at 224.)

In the *Tobin* case, the court decided precisely the same issue as that presented here. It stated the rule that the subpoena must be enforced without deciding whether the appellant is covered by the statute, provided the subpoena is relevant to a legitimate field of inquiry and is otherwise reasonable. The rule as stated in the *Tobin* and *Bland Lumber* cases has been adopted in succeeding cases.[16]

[16] See, for example: *United States* v. *Woerth*, 130 F. Supp. 930 (D. C. N. D. Iowa, 1955); *Kilgore National Bank* v. *Federal Petroleum Board*, 209 F. 2d 557 (C. A. 5, 1954); *N. L. R. B.* v. *Hamilton*, 24 LRRM 2525 (D. C. N. D. Cal., 1948).

Appellant seeks to avoid the impact of the decided cases by claiming that he has raised a question of the Commission's authority to act. He negated this whole argument in the court below when he conceded (R. 85) that the Commission did have authority to investigate the advertising practices of insurance companies. He makes no such concession in his present brief except indirectly (see *infra,* p. 17) but his failure to concede does not change the plain, unequivocal language of the McCarran Act which makes the Commission Act applicable to the business of insurance "to the extent such business is not regulated by State law." By simply asserting that the Commission is not acting "in accordance with law" appellant seeks to foreclose development of the evidence required to answer the questions posed by the act: What are the acts and practices? To what extent are those acts and practices regulated by state law?

Appellant avoids the real question of whether the Commission's subpoena is relevant to a legitimate field of inquiry. He tries to foreclose the Commission's investigation by suggesting that the McCarran Act did not make the Federal Trade Commission Act applicable when the state of incorporation of the company proceeded against has a law relating to insurance advertising or when it is possible to find some law which might relate to insurance advertising in the other jurisdictions in which the company does business. There is no warrant for such an interpretation of the McCarran Act. Clearly the Commission has been given some authority over the business of insurance. Whether the Commission Act covers this

particular company's acts and practices depends initially on a finding as to what those acts and practices are and the extent to which they are regulated by state law. The Commission makes the initial decision of coverage by looking at the practices and the law. After the Commission has issued an order the legal question of the extent that these practices are regulated by state law will be ripe for a final determination by a United States Court of Appeals when both the facts and the law are fully presented.

Appellant's argument that the Commission has no jurisdiction over any acts and practices of Fireman's Fund, as a matter of law, because it is regulated by California law would require an interpretation of the McCarran Act which would do violence to its language and which finds no support in the legislative history of the act [17] or the cases interpreting it.[18] This interpretation would mean that Congress by the McCarran Act made the area of operation of California law coextensive with the Federal Trade Commission Act

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[17] Senator McCarran in explaining the act said:

"* * * It is not the intention of Congress in the enactment of this legislation to clothe the States with any power to regulate or tax the business of insurance beyond that which which (sic) they had been held to possess prior to the decision of the United States Supreme Court in the South-Eastern Underwriters Association case. * * * In other words, we give to the States no more powers than they previously had, and we take none from them." (91 Cong. Rec. 1443.)

See also to the same effect H. R. No. 143, 79th Cong., 1st sess.

[18] See, for example, *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408 (1946); *Maryland Casualty Co.* v. *Cushing*, 347 U. S. 409, 413 (1954); *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310 (1955); *United States* v. *Sylvanus*, 192 F. 2d 96 (C. A. 7, 1951), cert. denied 342 U. S. 943 (1952).

and it would in effect substitute California for the Commission as the authority to police the channels of interstate commerce for the purpose of preventing the use of those channels for the dissemination of false or deceptive advertising.

If regulation of a company by the state in which it was incorporated was sufficient to exclude the Commission from jurisdiction over that company's activities anywhere in the United States, there would be no real protection to citizens in other states. There are some areas which the individual states with their limited territorial jurisdictions cannot regulate.[19] Problems arise particularly in connection with radio and television broadcasts, the use of the mails, the interstate distribution of periodicals and the use of bait advertising wherein isolated acts and practices are but part of a pattern which spells deception only when viewed as a whole. Even if a citizen of another state had any rights under California law, he would be forced to come to a California forum to protect those rights.

Appellant argues (Br., p. 38) that the states have been given a new power to regulate commerce but the

[19] *United States* v. *South-Eastern Underwriters Association*, 322 U. S. 533, 552 (1944).

*United States* v. *Sylvanus*, 192 F. 2d 96 (C. A. 7, 1951), cert. denied 342 U. S. 943 (1952), recognizes that the mails cannot be regulated by state law, and that federal jurisdiction over the mails did not interfere with state regulation of insurance.

Congress did not—"surrender control of the use of the mails or cease to authorize the federal courts to determine whether the mails have been utilized in attempted execution of a scheme to defraud, and that the district court, by entertaining jurisdiction, *did not interfere with regulation of the insurance company by the state* * * *." [Emphasis supplied.] (192 F. 2d 96, 100.)

legislative history of the McCarran Act makes clear that Congress did not attempt to grant the states any new power to regulate commerce.[20] Appellant quotes from *United States* v. *Darby,* 312 U. S. 100 (1941) but his quotation is a description of federal, not state power. It in no way supports his argument. In fact the *Darby* case makes clear that state regulation in itself would not exclude the Commission's jurisdiction:

> The power of Congress over interstate commerce "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution." *Gibbons* v. *Ogden, supra,* 196. That power can neither be enlarged nor diminished by the exercise or non-exercise of state power * * *,"
>
> It is no objection to the assertion of the power to regulate interstate commerce that its exercise is attended by the same incidents which attend the exercise of the police power of the states. (At 114.)

We do not argue that the California statute is unconstitutional, but appellant's interpretation of the California statute attempts to give it an extraterri-

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[20] *Prudential Ins. Co.* v. *Benjamin*, 328 U. S. 408 (1946); *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U. S. 310 (1955); *Robertson* v. *California*, 328 U. S. 440 (1946); Maryland Casualty *Co.* v. *Cushing*, 347 U. S. 409 (1954). See also H. R. No. 143, 79th Cong., 1st sess.

In the *Prudential* case, the Court said:

"And we agree with Prudential that there can be no inference that Congress intended to circumvent constitutional limitations upon its own power." (At 430.)

torial effect which even the cases cited by appellant (Br., pp. 43, 44) do not sustain.[21]

In the court below, appellant argued that if regulation of Fireman's Fund by California law did not oust the Commission of jurisdiction then the subpoena should be limited to those states which had no laws relating to insurance advertising. He admitted (R. 87) some states had no such laws. On this appeal, appellant does not press this argument, but returns to this theory in his conclusion (Br., p. 45) when he asks without argument that the subpoena be limited to those states which have no laws regulating insurance advertising. Here again appellant recognizes the Commission's authority to act in this field and, therefore, clearly presents only a question of coverage which is not to be decided at this stage of the proceeding.

In his brief appellant raises a question not raised below. He argued that there is regulation in every

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[21] *Alaska Packers Asso.* v. *Industrial Accident Com.*, 294 U. S. 532 (1935), (cited by appellant, Br., p. 44) states:

"The California statute does not purport to have any extra-territorial effect, in the sense that it undertakes to impose a rule for foreign tribunals, nor did the judgment of the state supreme court give it any." (At 540.)

"It is unnecessary to consider what effect should be given to the California statute if the parties were domiciled in Alaska or were their relationships to California such as to give it a lesser interest in protecting the employee by securing for him an adequate and readily available remedy." (At 543.)

See also *Watson* v. *Employers Liability Assurance Corp.*, 348 U. S. 66 (1954), (cited by appellant, Br., p. 44), wherein state action was upheld, but the court said:

"Here we have no claim of interference with interstate commerce or with the operations of the Federal government * * *." (At 82.)

state so that the Commission has no jurisdiction over insurance advertising. Appellant neglects to point out that state "regulation" (in the sense that every state had some law which might possibly relate to insurance advertising) existed at the time the McCarran Act was passed; but the Federal Trade Commission Act was still made applicable to the business of insurance. Clearly, Congress intended to give the Commission some jurisdiction over insurance, but under appellant's interpretation, the Commission at no time had any jurisdiction, whether or not states passed any further laws relating specifically to insurance.

Appellant does not show that there is state regulation of insurance in 48 states. For some states appellant cites regulations not specifically relating to insurance; for other states appellant does not cite the statutes at all, but merely refers to decisions by hearing examiners, the initial fact finders of the Commission, whose decisions on the law are in no way binding on either the Commission or the courts. He does not point out that other examiners have reached different conclusions or that the decisions of Examiners Hier and Cox to which he refers have been appealed to the Commission.

No facts are shown by appellant. Even the practices to be regulated by whatever state laws the court might find are unknown. Yet this is the precise function for which the Commission was created: to obtain the facts and to apply initially the law to the facts found. After this has been done it will then be appropriate for the courts to review the Commission's action.

Under appellant's mechanical theory of jurisdiction, if a state has enacted a law regulating insurance, there is no room for Federal jurisdiction. But Justice Holmes points out, in *St. Louis Cotton Compress Co.* v. *Arkansas,* 260 U. S. 346, 349 (1922) on which appellant relied (Br., p. 43): "It is true that the State may regulate the activities of foreign corporations within the State but it cannot regulate or interfere with what they do outside." [22] And as the Supreme Court said in *United States* v. *South-Eastern Underwriters Association,* 322 U. S. 533 (1944):

> The power granted Congress is a positive power. It is the power to legislate concerning transactions which, reaching across state boundaries, affect the people of more states than one—to govern affairs which the individual states, with their limited territorial jurisdictions, are not fully capable of governing. (At 552.)

Appellant could hardly contend seriously that there is no separate Federal jurisdiction. Yet appellant's argument presupposes that individual action by the

[22] It should be noted that appellant states (Br., p. 43) that modern cases have shown an increasing liberality in allowing states to regulate where under the old formulae represented by cases like *Allgeyer* v. *Louisiana* and *St. Louis Cotton Compress Co.* v. *Arkansas*, state regulations might have been considered unconstitutional. The House Report on the McCarran Act states: "Briefly, your committee is of the opinion that we should provide for the continued regulation and taxation of insurance by the states, subject always, however, to the limitations set out in the controlling decisions of the United States Supreme Court, as, for instance, in *Allgeyer* v. *Louisiana* (165 U. S. 578), *St. Louis Cotton Compress Co.* v. *Arkansas* (260 U. S. 346), and *Connecticut General Insurance Co.* v. *Johnson* (303 U. S. 77 * * *." (H. R. No. 143, 79th Cong., 1st sess.)

several states would result in the complete regulation of the use of the channels of interstate commerce, and that no matter what use might be made of such channels there could be no Federal regulation of them. Certainly there was no basis for such a contention prior to the McCarran Act and there is no basis for a claim that the act granted the states any new power.

We have shown (1) that the Commission acted within the scope of its statutory authority in bringing these proceedings, (2) that appellant is asking the court to decide only a question of coverage, and (3) that appellant's interpretation of the McCarran Act is not in accord with the legislative intent, the decided cases involving Federal and state jurisdiction over interstate commerce, or public policy.

### IV. Conclusion

The subpoena was issued in accordance with law. The Court cannot decide the question of coverage on this appeal from an order requiring appellant to give evidence. The Federal Trade Commission therefore prays that this Court affirm the order from which appellant prosecutes his appeal.

Respectfuly submitted.

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## APPENDIX

Pertinent provisions of the Federal Trade Commission Act:

SEC. 5. (a) (1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful,

* * * * *

(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporatitons * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce (38 Stat. 719 (1914), as amended, 15 U. S. C. 45 (a) (1952)).

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. * * * If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using

such method of competition or such act or practice. * * * (38 Stat. 719 (1914), as amended, 15 U. S. C. 45 (b) (1952).)

(c) * * * The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. (38 Stat. 719 (1914), as amended, 15 U. S. C. 45 (c) (1952).)

SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evi-

dence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof. (38 Stat. 722 (1914), as amended, 15 U. S. C. 49 (1952).)

Provisions of the McCarran-Ferguson Insurance Regulation Act:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

SEC. 2. (a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided,* That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

SEC. 3. (a) Until June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, and

the Act of June 19, 1936, known as the Robinson-Patman Anti-Discrimination Act, shall not apply to the business of insurance or to acts in the conduct thereof.

(b) Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation.

SEC. 4. Nothing contained in this Act shall be construed to affect in any manner the application to the business of insurance of the Act of July 5, 1935, as amended, known as the National Labor Relations Act, or the Act of June 25, 1938, as amended, known as the Fair Labor Standards Act of 1938, or the Act of June 5, 1920, known as the Merchant Marine Act, 1920.

SEC. 5. As used in this Act, the term "State" includes the several States, Alaska, Hawaii, Puerto Rico, and the District of Columbia.

SEC. 6. If any provision of this Act, or the application of such provision to any person or circumstances, shall be held invalid, the remainder of the Act, and the application of such provision to persons or circumstances other than those as to which it is held invalid, shall not be affected. (59 Stat. 33 (1945), as amended, 15 U. S. C. 1011 (1952).)

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